American Bar Association
www.supremecourtpreview.org

No. 07-1090 and 08-539

In the Supreme Court of the United States

REPUBLIC OF IRAQ, PETITIONER,
v.
JORDAN BEATY, ET AL., RESPONDENTS.

REPUBLIC OF IRAQ, PETITIONER,
v.
ROBERT SIMON, ET AL., RESPONDENTS.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF ELEVEN MEMBERS OF CONGRESS, WASHINGTON LEGAL FOUNDATION, VETERANS UNITED FOR TRUTH, NATIONAL VETERANS ORGANIZATION OF AMERICA, AND ALLIED EDUCATIONAL FOUNDATION, AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

Daniel J. Popeo
Richard A. Samp
Washington Legal Foundation
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302

Douglas W. Dunham
Counsel of Record
Ellen Quackenbos
Joseph H. Escandon
4 Times Square
New York, NY 10036
(212) 735-3000

Attorneys for Amici Curiae

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 4

ARGUMENT 6

I. THE EWSAA DID NOT AUTHORIZE SUSPENSION OF SECTION 1605(a)(7) WITH RESPECT TO IRAQ 6

II. SECTION 1605A OF THE FOREIGN SOVEREIGN IMMUNITY ACT DOES NOT APPLY TO THESE CASES 13

CONCLUSION 20

TABLE OF AUTHORITIES

Cases **Page(s)**

Acree v. Republic of Iraq, 370 F.3d 41 (D.C. Cir. 2004), *cert. denied* 544 U.S. 1010 (2005) 3-8, 11

Arcadia, Ohio v. Ohio Power Co., 498 U.S. 73 (1990) 8, 9

Cicippio-Puleo v. Islamic Republic of Iran, 353 F.3d. 1024 (D.C. Cir. 2004) 13

Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001) 8

Cleveland v. United States, 329 U.S. 14 (1946) 9

Consumer Products Safety Commission v. GTE Sylvania, Inc., 447 U.S. 102 (1980) 12

Holloway v. United States, 526 U.S. 1 (1999) 7

Hughes Aircraft Co. v. United States ex rel. Schumer, 520 U.S. 939 (1997) 19

King v. St. Vincent's Hospital, 502 U.S. 215 (1991) 6, 7

Landgraf v. USI Film Products, Inc., 511 U.S. 244 (1994) 18, 19

Loving v. United States, 517 U.S. 748 (1996) ... 12

Simon v. Republic of Iraq, 529 F.3d 1187 (D.C. Cir. 2008), *cert. granted sub nom. Republic of Iraq v. Simon*, 128 S. Ct. 894 (2009) 4, 14

United States v. Morrow, 266 U.S. 531 (1925) 8

Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480 (1983) 19, 20

Whitman v. American Trucking Associations, 531 U.S. 457 (2001) 12

Rules & Statutes **Page(s)**

28 U.S.C. § 1605A 13, 15

Pub. L. No. 108-11, 117 Stat. 559 6

Pub. L. No. 110-181, § 1083(c)(1), 122 Stat. 3 14

Pub. L. No. 110-181, § 1083(c)(2), 122 Stat. 3 15

Pub. L. No. 110-181, § 1083(c)(3), 122 Stat. 3 14

Pub. L. No. 110-181, § 1083(c)(4), 122 Stat. 3 ..... 13, 17

Pub. L. No. 110-181, § 1083(d)(1), 122 Stat. 3 13

Other Authorities **Page(s)**

142 Cong. Rec. H2141-42 (daily ed. Mar. 13, 1996) (Statement of Rep. Fox) 11

142 Cong. Rec. S3463 (daily ed. Apr. 17, 1996) (Statement of Senator Brown) 11

Letter from George W. Bush, President of the U.S. to J. Dennis Hastert, Speaker of the House of Representatives and Accompanying Materials (March 25, 2003), *available at* http://www.whitehouse.gov/omb/budget/amendments/supplemental_3_25_03.pdf 9-10

INTEREST OF *AMICI CURIAE*[1]

Amici include nonprofit organizations and a group of distinguished United States Representatives and Senators.

Amicus curiae the Washington Legal Foundation ("WLF") is a national nonprofit public interest law and policy center based in Washington, D.C., with supporters nationwide. WLF regularly appears in this Court and lower federal courts as *amicus curiae* supporting a strong national security and defense. WLF filed an amicus brief in support of the petition for certiorari in *Acree v. Iraq*, No. 04-820, also addressing issues relating to the terrorism exception under the Foreign Sovereign Immunities Act.

Amicus curiae Veterans United for Truth, Inc. is a nonprofit organization dedicated to serving the interests of both current military personnel and veterans. Veterans United for Truth works to improve the accession, training, equipping, and commitment of active-duty and reserve force military; to ensure that all persons active, reserve, and guard are told the truth about the reasons for their commitment to specific conflicts, and the truth about their obligations; to work to ensure that the dependents of all persons on active duty receive services in a timely fashion; and to work for legislation that guarantees benefits to all veterans without undue administrative complexity. The group believes that the courthouse doors

---

[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, or their counsel, made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

should remain open to veterans who claim to have been tortured while serving in the armed forces.

Amicus curiae the Allied Educational Foundation ("AEF") is a nonprofit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study and has appeared as *amicus curiae* in this Court on a number of occasions. AEF supports efforts to ensure that American citizens have the means to seek judicial redress when they are intentionally harmed by terrorists and/or supporters of terrorism.

Amicus curiae the National Veterans Organization of America ("NVOA") is a nonprofit organization dedicated to the preservation and enhancement of the rights of veterans. It has more than 5,000 members nationwide, consisting primarily of disabled veterans. A primary focus of NVOA is ensuring that veterans are provided forums that allow for speedy recovery of service-connected injuries.

United States Representative Bruce Braley (D, IA-01), serves on the House Energy and Commerce Committee. United States Representative Joe Sestak (D, PA-07), serves on the House Armed Services Committee. United States Representative Barbara Lee (D, CA-09), serves on the House Foreign Relations Committee. United States Representative Hank Johnson (D, GA-04), serves on the House Armed Services and Judiciary Committees. United States Representative Steve Kagen (D, WI-08), serves on the House Agriculture and Transportation Committees. United States Representative Debbie Wasserman Schultz (D, FL-20), serves on the House Appropriations and Judiciary Committees. United States Representative Jim McGovern (D, MA-03), serves on the House Rules and Budget

Committees. United States Representative Bob Filner (D, CA-51), chairs the House Committee on Veterans' Affairs. United States Representative Peter Welch (D, VT) serves on the House Committee on Energy and Commerce. United States Senator Tom Harkin (D, IA), chairs the Senate Agriculture, Nutrition, and Forestry Committee. United States Senator Frank R. Lautenberg (D, NJ) serves on the Senate Appropriations Committee.

This case presents questions of great importance regarding the jurisdiction of courts in the United States to hear claims against foreign governments for acts of terror or hostage-taking. Here, based upon a careful examination of the statutory provisions at issue, the United States Court of Appeals for the District of Columbia Circuit permitted Respondents' claims against the Republic of Iraq to go forward. The court followed its earlier holding in *Acree v. Republic of Iraq*, 370 F.3d 41 (D.C. Cir. 2004), ruling that the 2003 statutory grant of authority to the President under the Emergency Wartime Supplemental Appropriations Act ("EWSAA") to suspend the application to Iraq of provisions of law that applied to countries that have supported terrorism did not extend to the jurisdictional provisions of section 1605 of the Foreign Sovereign Immunity Act ("FSIA"). The court also held that the 2008 amendment of section 1605 and new section 1605A do not apply retroactively to deprive the courts of jurisdiction over these cases. *Amici* respectfully submit that the statutory analysis of the court of appeals should be affirmed by this Court.

Congress has repeatedly and consistently expressed its outrage over the torture, hostage-taking and killing of American citizens carried out by the former government of Iraq and by other countries designated as state sponsors of terrorism. Since 1996 Congress has passed a

series of laws not only aimed at punishing and deterring terrorist acts, but also at providing a means of obtaining compensation and restitution for American citizens who have been the victims of such acts. Overturning the decisions by the court of appeals as to the statutory interpretation and application of section 1503 of EWSAA and section 1605A of the FSIA would severely undercut the right of the Plaintiffs-Respondents in these cases to seek redress and compensation for personal injuries caused by acts of torture and terrorism directed at Americans.

SUMMARY OF ARGUMENT

This Court should affirm the determinations by the court of appeals that section 1503 of the EWSAA did not authorize the President to abolish the jurisdiction of the courts in actions against Iraq under section 1605(a)(7) of the FSIA and that section 1605(a)(7) continues to provide jurisdiction over cases that were pending at the time of the 2008 amendment of section 1605 and enactment of new section 1605A.

The court of appeals correctly held in *Acree v. Republic of Iraq*, 370 F.3d 41 (D.C. Cir. 2004), *cert. denied*, 544 U.S. 1010 (2005), *followed in Simon v. Republic of Iraq*, 529 F.3d 1187 (D.C. Cir. 2008), *cert. granted sub nom. Republic of Iraq v. Simon*, 128 S. Ct. 894 (2009), that the language of section 1503 authorizing the President to make inapplicable to Iraq "any other provision of law that applies to countries that have supported terrorism" must be interpreted in light of the statute as a whole and its purposes. *Acree*, 370 F.3d at 54. Accordingly, the court determined that "any other provision" should be read to mean provisions that, like the provisions specifically enumerated in section 1503, call for economic sanctions and prohibit grants of assistance to state sponsors of terrorism. *Id.* As the court

further concluded, the terrorism exception found in section 1605(a)(7) is not such a provision and is not so similar to such provisions as to come within the scope of section 1503. In so holding, the court of appeals took note of the fact that the EWSAA was enacted at the request of President Bush to provide emergency supplemental appropriations to support Department of Defense operations in Iraq and that section 1503 appeared in Chapter 5 of the EWSAA, a chapter whose central function was to provide for relief and reconstruction in post-war Iraq.

The court of appeals also rejected Petitioner's contention that the recodification of the terrorism exception in new section 1605A of the FSIA and the repeal of section 1605(a)(7) ousted the jurisdiction of the courts in cases already pending under section 1605(a)(7). Likewise, the court held that the authority granted to the President to waive any provision of section 1605A and of section 1083 of the National Defense Authorization Act for Fiscal Year 2008, which enacted section 1605A, did not extend to section 1605(a)(7) and did not permit the President to waive jurisdiction as to cases already pending under section 1605(7). These conclusions, with which the United States as *amicus curiae* concurs, are based upon a careful and correct analysis of the statutory language and should be affirmed by this Court.

In making these determinations, the court of appeals did not rely upon any presumptions as to the retroactivity or non-retroactivity of statutory amendments to the jurisdiction of the courts. However, *amici* submit that retroactive application of the statutes in question would impair existing rights of the Plaintiffs-Respondents and that therefore, in the absence of any clear expression by Congress that these statutes should apply retroactively, these statutes are presumptively non-retroactive.

For these reasons, as set forth more fully below, *amici* respectfully urge that the Court affirm the determination of the court of appeals that the courts continue to have jurisdiction over these cases under section 1605(a)(7) of the FSIA.

ARGUMENT

I. THE EWSAA DID NOT AUTHORIZE SUSPENSION OF SECTION 1605(a)(7) WITH RESPECT TO IRAQ

The Court of Appeals for the District of Columbia Circuit correctly held in *Acree v. Republic of Iraq*, 370 F.3d 41 (D.C. Cir. 2004), that section 1503 of the EWSAA did not authorize the President to suspend the application of section 1605(a)(7) of the FSIA and correctly followed that precedent in the case at bar.

Applying long established principles of statutory interpretation, the court of appeals concluded that section 1503, "read in the context of the EWSAA as a whole and its legislative history, is aimed at legal provisions that present obstacles to assistance and funding for the new Iraqi Government and was not intended to alter the jurisdiction of the federal courts under the FSIA." *Acree*, 370 F.3d at 51 (citing *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991)).

Section 1503 of the EWSAA granted the President authority to suspend the application of any provision of the Iraq Sanctions Act of 1990. Pub. L. No. 108-11, 117 Stat. 559, 579. That grant of authority is contained in the main clause of section 1503. *Id.* ("The President may suspend the application of any provision of the Iraq Sanctions Act of 1990.") That single main clause is followed by eight provisos, each of which is introduced by the words "provided" or "provided further." It is the second of these subordinate

clauses or provisos that contains the language at issue: "Provided further, That the President may make inapplicable with respect to Iraq section 620A of the Foreign Assistance Act of 1961 *or any other provision of law that applies to countries that have supported terrorism.*" *Id.* (emphasis added). Further provisos state, *inter alia*, that "section 307 of the Foreign Assistance Act of 1961 shall not apply with respect to programs of international organizations for Iraq" and that "provisions of law that direct the United States Government to vote against or oppose loans or other uses of funds, including for financial or technical assistance, in institutional financial institutions for Iraq shall not be construed as applying to Iraq." *Id.*

Petitioner Iraq seeks to have this Court read the words "any other provision of law that applies to countries that have supported terrorism" as reaching so broadly as to include the jurisdictional provisions of the FSIA, which give the courts in the United States jurisdiction to hear claims for personal injury or death caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act.

Petitioner's argument for an expansive meaning to the words "any other provision" runs afoul of the canons of statutory interpretation that require a statutory phrase to be read and interpreted with reference to the statute as a whole, with regard to not only the meaning of the word or phrase but also its "'placement and purpose in the statutory scheme.'" *See Holloway v. United States*, 526 U.S. 1, 6 (1999) (citation omitted); *see also King*, 502 U.S. at 221. The grammatical structure and context of the statute require limiting the meaning of "any other provision of law that applies to countries that have supported terrorism" as the court of appeals did in its decision in *Acree*. As the court pointed out in its

opinion, each of the provisos of section 1503 are "responsive" to the authority provided in the main clause of the statute to suspend the application of the Iraq Sanctions Act. 370 F.3d at 54. Each proviso either facilitates or defines and limits that authority and/or identifies further specific statutes whose applicability to Iraq may be suspended. As the court of appeals noted, the specific statutory provisions identified in Section 1503 are all statutes that sanction countries that support terrorism by imposing limits and restrictions on economic aid and assistance. Accordingly, the "grammatical and logical scope" of the statutory phrase "any other provision of law that applies to countries that have supported terrorism" confines its meaning to the "subject-matter of the principal clause," *United States v. Morrow*, 266 U.S. 531, 534-35 (1925), that is, to provisions imposing economic sanctions on Iraq or preventing aid and assistance to Iraq.

The broad reading of the statutory phrase "and any other provision of law . . . " proposed by Petitioners would make that language the most significant language in the statute, giving far reaching effects to a single phrase in an ancillary clause, and improperly rendering superfluous much of the rest of the statute. *See Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 113 (2001) ("'Our cases express a deep reluctance to interpret a statutory provision so as to render superfluous other provisions in the same enactment.'" (citation omitted)). In particular, there would have been no need to list out in the statute specific provisions that the President was authorized to make non-applicable to Iraq, if the intent was to allow the President to make non-applicable any statute whatsoever that applied to countries that support terrorism. *See Arcadia, Ohio v. Ohio Power Co.*, 498 U.S. 73, 78-79 (1990) (rejecting interpretation of statute that would "render[] the section's careful enumeration of subjects superfluous"; residual clause should not

"swallow[] what precedes it").

If Congress had intended the expansive meaning urged by Petitioner Iraq, the statute could simply have authorized the President to suspend the application to Iraq of any provision of law applicable to countries that support terrorism. *Cf. Arcadia*, 498 U.S. at 78. Instead, through its listing of specific provisions of law, section 1503 makes clear that its exclusive focus is to permit the President to move quickly to set aside economic sanctions against Iraq and to remove legal impediments to the provision of economic aid and assistance to Iraq. Thus, the phrase in section 1503 "and any other provision of law . . . " should be interpreted as "confined to the class" of statutes expressly enumerated in light of the nature of the provisions of law expressly enumerated in the section. *See, e.g., Cleveland v. United States*, 329 U.S. 14, 17-18 (1946) (construing the words "any other immoral purpose" in the statutory phrase "for the purpose of prostitution or debauchery, or for any other immoral purpose" as confined to category of immoral purposes of like kind to prostitution and debauchery).

Both the majority opinion in *Acree* and the dissenting opinion by then Judge Roberts agreed that the EWSAA was not entirely clear and the question of statutory interpretation was "close." *See Acree*, 370 F.3d at 51; *see also id.* at 62 (Roberts, J., dissenting in part). The majority found, however, that the legislative history of the EWSAA bolstered their conclusion that the EWSAA did not provide authority for suspending section 1605(a)(7).

The EWSAA was enacted, pursuant to President Bush's request

> for supplemental appropriations that would provide funds to cover military

> operations, relief and reconstruction activities in Iraq, ongoing operations in the global war on terrorism, enhancements to the safety of U.S. diplomats and citizens abroad, support for U.S. allies critical to succeeding in the war, and homeland security protection and response measures.

Letter from George W. Bush, President of the U.S., to J. Dennis Hastert, Speaker of the House of Representatives, and Accompanying Materials, at 3 (March 25, 2003), *available at* http://www.whitehouse.gov/omb/budget/amendments/supplemental_3_25_03.pdf.

Accompanying the President's letter was, *inter alia*, draft language for what ultimately was passed into law as section 1503, along with an explanation of the provision. The draft language proposed by the President is substantially similar, although not identical to the provision ultimately enacted. The accompanying explanation for the provision stated:

> This provision would repeal the Iraq Sanctions Act of 1990, which requires the President to continue an embargo on Iraq and impose certain mandatory sanctions against Iraq, including prohibitions on arms sales, certain exports, foreign assistance and Export-Import Bank Credits. It would also authorize the President to make inapplicable with respect to Iraq section 620A, and section 620G, and section 307 of the Foreign Assistance Act.

Id. at 38. Significantly, neither the President's draft language nor the explanation even hints at the possibility that the President would attempt to use the statute to prevent suits against Iraq under section 1605(a)(7) of the FSIA.

In attempting to bring section 1605(a)(7) within the category of statutes affected by section 1503, Petitioner Iraq and *amicus* the United States repeatedly refer to the terrorism exception to the FSIA as a "sanction." *See, e.g.*, Pet. Br. at 19, 27; United States Am. Br. at 2, 12, 15, 16. It is plain, however, that the terrorism exception, while concededly having some penalizing or deterrent effect, is primarily aimed at providing compensation and relief for victims of terrorism.

The terrorism exception was added to the FSIA in 1996, as part of "Title II—Justice for Victims" of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 221, 110 Stat. 1214, 1241 (1996). The legislative history of the terrorism exception, while recognizing that the provision would have a deterrent effect, indicates that the provision will "provide[] vital remedies for victims" and "a responsible avenue for victims to seek just compensation." 142 Cong. Rec. S3463 (daily ed. Apr. 17, 1996) (statement of Senator Brown). Likewise, as Representative Fox stated:

> We cannot tolerate support for terrorism from foreign governments. No member of the community of nations should condone or assist such reprehensible violence. And no foreign state should be able to hide behind its immunity as a sovereign government to avoid having to pay the consequences of supporting terrorism. Accordingly, I introduced H.R. 1877, the State-Sponsored Terrorism Responsibility Act *to allow American victims to have a means of redress in the courts.*

142 Cong. Rec. H2141-42 (daily ed. Mar. 13, 1996) (statement of Rep. Fox) (emphasis added).

Thus, the court of appeals in *Acree* properly rejected the argument that the terrorism

exception to the FSIA was simply another sanction that was "similar in nature to the legal restrictions on assistance to Iraq that are enumerated elsewhere in § 1503" and therefore fell "within the scope of provisions the President is authorized to make inapplicable to Iraq." *Acree*, 370 F.3d at 57. As the court of appeals recognized, section 1605(a)(7) is "largely dissimilar" to the "'look-alike' provisions" expressly made subject to the President's authority under section 1503. *Id.*

Section 1605(a)(7) is not only dissimilar to the other provisions explicitly listed in section 1503, but, as Congress has made clear, is also legislation in an area of particular concern to Congress. It is implausible to suggest that Congress – without debate or discussion – intended to alter fundamentally the scope and application of section 1605(a)(7) with respect to Iraq through section 1503's residual clause "and any other provision of law." Section 1503 should not be construed to produce that result. *Cf. Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001) ("Congress . . . does not . . . hide elephants in mouseholes.").

Indeed, Congress has now removed any doubt as to the correctness of the holding of the court of appeals on this issue. Section 1083 of the National Defense Authorization Act for Fiscal Year 2008 ("NDAA") includes the following statutory provision:

> Nothing in section 1503 of the Emergency Wartime Supplemental Appropriations Act, 2003 (Public Law 108-11, 117 Stat. 579) has ever authorized, directly or indirectly, the making inapplicable of any provision of chapter 97 of title 28, United States Code, or the removal of the jurisdiction of any court of the United States.

Pub. L. No. 110-181, § 1083(c)(4), 122 Stat. 3, 343 (2008). This formal and explicit declaration of the meaning of section 1503, contained in "subsequent *legislation*" with respect to which "Congress has proceeded formally through the legislative process," is entitled to "'great weight'" in the construction of section 1503. *See Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 118 n.13 (1980) (citation omitted); *see also Loving v. United States*, 517 U.S. 748, 770 (1996) (citing cases). As the court of appeals held, section 1503 did not empower the President to abolish the jurisdiction of the courts in these cases.

II. SECTION 1605A OF THE FOREIGN SOVEREIGN IMMUNITY ACT DOES NOT APPLY TO THESE CASES

The terrorism exception to foreign sovereign immunity has now been recodified in new section 1605A. 28 U.S.C. § 1605A. Section 1605A is similar to its predecessor, section 1605(a)(7), but is as the court of appeals noted, "more advantageous to plaintiffs in several respects."[2] Pet. App. at 322. Section 1083 of the NDAA, the Act that sets forth new section 1605A, grants the President authority to "waive any provision of this section with respect to Iraq," Pub. L. No. 110-181, § 1083(d)(1), 122 Stat. at 343. President Bush exercised that authority. Petitioner Iraq now contends that, in pending cases brought under old section 1605(a)(7), the courts' only source of jurisdiction is now new section 1605A

---

[2] Section 1605A precludes a foreign state from filing an interlocutory appeal under the "collateral order" doctrine, § 1605A(f), permits a plaintiff to attach property in advance of judgment, § 1605A(g), and creates a federal right of action against foreign states, for which punitive damages may be awarded, § 1605A(c), thus abrogating *Cicippio-Puleo v. Islamic Republic of Iran*, 353 F.3d 1024 (D.C. Cir. 2004).

and that, the President having waived the application of section 1605A to cases against Iraq, the courts no longer have jurisdiction to hear these cases. The court of appeals properly rejected that contention, as should this Court.[3]

As the court of appeals held, section 1083's references to and provisions regarding pending cases, read in light of the whole of sections 1083 and 1605A, make clear that section 1605(a)(7) continues to provide the courts with jurisdiction to hear cases brought and still pending under that section.

First, in subsection (c), entitled "Application to Pending Cases," section 1083 states: "IN GENERAL. –The amendments made by this section shall apply to any claim arising under section 1605A of title 28, United States Code." § 1083(c)(1), 122 Stat. at 342. As the court of appeals pointed out, claims previously filed under and pending under section 1605(a)(7) did not "aris[e] under" section 1605A. *Simon*, 529 F.3d at 1192. If new section 1605A applied to all claims, including claims that were brought under section 1605(a)(7), there "would be no need to specify that 'the amendments . . . apply to any claim arising under section 1605A." *Id.*

The use of the word "claim" in subsection (c) is also significant. As other provisions in section 1083 make clear, an action already pending under section 1605(a)(7) may end up consisting of the claims brought in the original action and claims brought in a "related action" under section 1605A. Under section 1083(c)(1), claims brought in such a related action "arise under" section 1605A and are therefore subject to the

---

[3] The United States as *amicus curiae* has taken the position that the enactment of section 1083 did not abolish the courts' jurisdiction over pending cases under section 1605(a)(7). *See* United States Am. Br. at Point II.

amendments made by section 1083. Thus, the fact that the amendments made by section 1083 apply to a "claim" (rather than to an action or a case) confirms that section 1605A was not intended to apply and does not apply automatically across the board to actions pending under section 1605(a)(7).

The statute's provisions for "related actions," which are also part of subsection (c), clearly contemplate the continued prosecution of a pending action under section 1605(a)(7). Under section 1083(c)'s provisions for pending cases, the plaintiffs in an action already pending under section 1605(a)(7) may either (i) in certain circumstances refile the action under section 1605A, *see* § 1083(c)(2)(A), or (ii) file a "related action" under section 1605A, *see* § 1083(c)(3). The first option, refiling, exists for cases in which a plaintiff brought an action under section 1605(a)(7), relied upon section 1605(a)(7) as creating a cause of action, and has been adversely affected on the grounds that section 1605(a)(7) fails to create a cause of action against the foreign state so sued. *See* § 1083(c)(2)(i)–(iv).

The second option, filing a related action, exists when "an action arising out of an act or incident has been timely commenced under section 1605(a)(7)." § 1083(c)(3). In such a case, the plaintiff is permitted to file any "other" action arising out of "the same act or incident" under section 1605A. *Id.* A related action must be commenced not later than the latter of 60 days after the date of the entry of judgment in the original action, or the date of the enactment of the NDAA. *Id.* In short, the statute clearly provides for the possibility that an action "has been" commenced under section 1605(a)(7) – and the present perfect tense indicates that the action continues to be filed and remains pending – and that another additional action may be filed under 1605A to assert additional claims arising under

that section. *See id.*; *see also* § 1065A(a)(2)(A)(i)(I)–(II) (providing that a claim shall be heard "under this section" *inter alia* if the claim is "filed under this section," if the action is "refiled under this section by reason of section 1083(c)(2)(A)" or "is filed under this section by reason of section 1083(c)(3)" and the various conditions of section 1065A(a)(2)(ii) are met).

There is no suggestion or indication anywhere in section 1605A or section 1083 that in cases in which a related action is brought under section 1605A that the original action under section 1605(a)(7) is mooted or no longer exists or that jurisdiction is withdrawn for such an action. Rather, it is clear from the structure and language of section 1083 that the provisions in sections 1083 and 1605A as to related actions are designed to permit plaintiffs in already pending actions that are viable under section 1605(a)(7) to file additional claims under section 1605A without jeopardizing the court's jurisdiction over their original claims.

In short, section 1083's careful and detailed provisions for pending actions and its distinction between pending actions which may be refiled and pending actions in which related actions may be filed provide confirmation that section 1083 does not remove the court's jurisdiction over actions pending under section 1605(a)(7).

Nor is there any suggestion or indication that the authority granted to the President in section 1083(d) to "waive any provision of this section with respect to Iraq" applies to actions brought under section 1605(a)(7). Indeed, the President's waiver authority expressly and specifically applies only to provisions of "this section," *i.e.*, section 1083 (and therefore to section 1605A which is contained within section 1083). That waiver authority does not apply to section 1605(a)(7).

Moreover, section 1083(c)(4) makes clear that the authority granted to the President in section 1503 of EWSAA did not and does not apply to any provision of the FSIA, including section 1605(a)(7). Section 1083(c)(4), which is entitled "PRESERVING THE JURISDICTION OF THE COURTS," states that

> [n]othing in section 1503 of the Emergency Wartime Supplemental Appropriations Act, 2003 (Public Law 108-11, 117 Stat. 579) has ever authorized, directly or indirectly, the making inapplicable of any provision of chapter 97 of title 28, United States Code, or the removal of the jurisdiction of any court of the United States.

§ 1083(c)(4).[4]

This clarification would be entirely unnecessary and the whole issue mooted if Petitioner Iraq were correct that the courts' jurisdiction over cases pending under section 1605(a)(7) were withdrawn retroactively. Plaintiffs in pending cases against Iraq would then be subjected to the requirements of new section 1605A and to the waiver of those provisions that the President signed on the same day he signed section 1083 into law. The clarification provided by section 1083(c)(4) as to "PRESERVING THE JURISDICTION OF THE COURTS" is meaningful only under the assumption that section 1083 contemplates continuing jurisdiction under section 1605(a)(7). Under that assumption, the clarification provided is necessary to confirm the

---

[4] Thus, as noted in Point I *supra*, section 1083 confirms the correctness of the ruling by the court of appeals that section 1503 of EWSAA did not authorize the President to remove the jurisdiction of the Courts over claims against Iraq by making section 1605(a)(7) inapplicable with respect to actions brought against Iraq.

correctness of decision by the court of appeals in *Acree* as to the meaning of section 1503 of the EWSAA and to forestall the possible overturning of that decision by this Court, contrary to the intent of Congress. As such, section 1083(c)(4) strongly supports the courts' continuing jurisdiction over pending claims brought under section 1605(a)(7).

In sum, as the court of appeals held, the enactment of section 1605A did not remove jurisdiction in cases pending under section 1605(a)(7). Rather, the provisions in section 1083 and section 1605A for pending cases, taken together and in the context of the statute as a whole, make clear that cases pending under section 1605(a)(7) remain subject to that section unless they are refiled under section 1605A. Moreover, if a related action is filed asserting additional claims arising under section 1605A, those additional claims are governed by section 1605A and the provisions of section 1083, but the original action remains under the jurisdiction of the court pursuant to section 1605(a)(7).

Finally, retroactive application of section 1605A and section 1083 would impermissibly impair antecedent rights of the plaintiffs-respondents. In *Landgraf v. USI Film Products, Inc.*, 511 U.S. 244 (1994), this Court emphasized that "the presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic." *Id.* at 265. *Landgraf* does not discuss or refer to the FSIA. It does note, however, that "[c]hanges in procedural rules may *often* be applied in suits arising before their enactment without raising concerns about retroactivity," *id.* at 274 (emphasis added), and that jurisdictional statutes normally "'speak to the power of the court rather than to rights or obligations of the parties,'" *id.* at 275 (citation omitted). But, as the Court explained, the reason

that changes in jurisdictional rules "usually" apply retroactively is because such a change "usually" does not affect the antecedent rights of the parties. *Id.* at 274-75.

A jurisdictional statute may have substantive effects that preclude retroactive application when it "speaks not just to the power of a *particular* court" to hear the suit, but affects "whether [the suit] may be brought at all." *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 951 (1997). "Such a statute, even though phrased in 'jurisdictional' terms, is as much subject to our presumption against retroactivity as any other." *Id.*

In the present cases, retroactive application of section 1065A or section 1083 (and for that matter section 1503 of the EWSAA) unquestionably affects whether these suits may be brought at all. Indeed, in *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 496-97 (1983), this Court expressly distinguished the FSIA from jurisdictional statutes that "do nothing more than grant jurisdiction over a particular class of cases." The Court ruled that the FSIA

> does not merely concern access to the federal courts. Rather, it governs the types of actions for which foreign sovereigns may be held liable in a court in the United States, federal or state. The Act codifies the standards governing foreign sovereign immunity as an aspect of *substantive federal law* . . . .

Id. (emphasis added). The Court explained that the effect of a court's ruling as to sovereign immunity will determine whether a "plaintiff will be barred from raising his claim in any court in the United States," thus determining whether "'the title or right set up by the party, may be defeated . . . or sustained.'" *Id.* at 497 (citation

omitted). Under *Verlinden* and this Court's retroactivity jurisprudence, neither the amendments to the FSIA nor any statutory provision that would (arguably) grant the President power to alter the application of the FSIA to Iraq in terrorism exception cases should be applied retroactively to strip the courts of jurisdiction over pending cases.

CONCLUSION

The Court should affirm the decisions of the court of appeals holding that section 1503 of EWSAA did not give the President authority to abolish the jurisdiction of the courts over these actions under section 1605(a)(7) and that that jurisdiction over these cases was not withdrawn by the enactment of section 1605A or by the President's exercise of the authority granted him under section 1083(d) of the NDAA.

Respectfully Submitted,

Daniel J. Popeo
Richard Samp
Washington Legal Foundation
2009 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 588-0302

Douglas W. Dunham
Counsel of Record
Ellen P. Quackenbos
Joseph H. Escandón
4 Times Square
New York, NY 10036
(212) 735-3000

March 25, 2009